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were rightly rejected, for reasons which are already sufficiently stated.

The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and *judgment entered on the verdict*.

*In the Supreme Judicial Court of Massachusetts, September Term,
1859.*

DANA H. FITCH AND OTHERS vs. SAMUEL P. HARRINGTON AND OTHERS.¹

1. An agreement between one partner and a third person, that the latter shall participate in that partner's share of the profits of the firm, as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their copartner.
2. The acts and declaration, of a person not a partner are not admissible to charge him as a partner, without showing that they were brought home to the plaintiff's knowledge.

Action on a promissory note signed by the name of Whittemore, Harrington & Co. Trial before METCALF, J., who signed this bill of exceptions :

“Samuel P. Harrington alone made defence; and the only question was, whether he was liable, as a partner, with the other defendants.

“It was in evidence that the firm of Whittemore, Harrington & Co. was formed in July 1856, and carried on business until the latter part of October 1857, when they stopped payment; and that the notes in suit were given for articles used in the business of the firm.

“The plaintiffs introduced evidence tending to show that Samuel P. Harrington was a member of said firm, as between the partners themselves; that the share in the concern, standing in the name of Leonard Harrington (one of the members of the firm) was owned

¹ We are indebted to Hon. Mr. Justice Metcalf, for this opinion.—*Eds. Am. L. Reg.*

jointly by Leonard and Samuel P. Harrington; that Samuel P. held himself out to the plaintiffs, expressly, and also to the public at large, as one of the partners in the firm; and that the plaintiffs gave credit to Whittemore, Harrington & Co., under the belief that he was a partner.

“The defendant, Samuel P. Harrington, introduced evidence, tending to show that he was not a partner in the firm; that he had not held himself out as such to the public at large, nor to the plaintiffs; that he had no interest in the share of the concern standing in the name of Leonard Harrington; and that he was not known nor recognized as a partner by the members of the firm.

“The plaintiffs requested the court to instruct the jury, that although Samuel P. Harrington was not known by the members of the firm generally, to be a partner, yet if the share in the partnership concern, which share stood in the name of Leonard Harrington only, was owned jointly by Leonard and Samuel P., and Samuel P., as between him and Leonard, was entitled to the profits, if any, which might be derived from that share, he (Samuel P.) was a partner in the firm, as to the plaintiffs, and liable to them in this action; that if he held himself out as a partner in the firm, under such circumstances as to induce the plaintiffs to give credit to the firm under that belief, though he was not in reality a partner, he was still liable to them as such; and that his acts and declarations, if made publicly, though not brought to the knowledge of the plaintiffs, were competent evidence that he so held himself out, and thereby induced the plaintiffs to give credit to the firm, under the belief that he was a partner.

“The court declined to give instructions in the terms requested; but instructed the jury as follows: That if Samuel P. Harrington was a member of the firm, when the notes in suit were given, he was liable in this action, whether the plaintiffs then knew or did not know that he was a partner, or whether they did or did not give credit to the firm on the belief that he was a partner; that if he was not a member of the firm, yet, if by his acts and declarations, which were brought home to the knowledge of the plaintiffs, he led them to believe that he was a member of the firm, and to give credit to

the firm in that belief, he was liable to them in this action ; that his acts and declarations to persons other than the plaintiffs were evidence for the jury to consider, in determining the question whether he was a member of the firm ; but if such acts and declarations did not satisfy the jury that he was a member of the firm, then they were not evidence which would render him liable to the plaintiffs, unless knowledge of them was brought home to the plaintiffs, and induced them to give credit to the firm in the belief that he was a member of the firm ; that if the share in the partnership concern, which share stood in the name of Leonard Harrington only, was owned jointly by him and Samuel P. Harrington, then Samuel P. was liable in this action ; but if there was a sub-partnership between Leonard and Samuel P., by which Samuel P. was to share in the profits of the firm, to which profits Leonard was entitled, this alone would not make Samuel P. liable for the debts of the firm.

“The jury returned a verdict for the defendant, and the plaintiffs excepted to the instructions given to the jury.”

The opinion of the Court was delivered by

METCALF, J.—We are all of opinion that the plaintiffs are entitled to a new trial, for the reason that the instruction respecting a sub-partnership between Leonard Harrington and Samuel P. Harrington, given, as it was, without any explanation, may have misled the jury. That part of the instructions was given on the authority of Collyer on Partnership, (3d ed.) § 194, which was cited by the defendants' counsel at so late a stage of the trial, that the court had no opportunity to examine the position there laid down, which is thus : “Although the *delectus personæ*, which is inherent in the nature of partnership, precludes the introduction of a stranger against the will of any of the copartners, yet no partner is precluded from entering into a sub-partnership with a stranger ; *nam socii mei socius, meus socius non est*. In such case, the stranger may share the profits of the particular partner with whom he contracts, and, not being engaged to the general partnership, will of course not be liable for their debts.”

The only decided cases which Mr. Collyer cites, in support of this position, are that of *Sir Charles Raymond*, referred to by Lord Eldon, in *Ex parte Barrow*, 2 Rose, 255, and that of *Brown vs. De Tastet*, Jac. 284. In the case in 2 Rose, Lord Eldon said: "I take it to have been long since clearly established, that a man may become a partner with A., where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond, that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held, that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." In the case in Jacob, it was decided, that where one of several partners had agreed with a third person to give him a moiety of his share in the concern, the court of chancery might decree an account between them, without making the other partners parties to the bill. These cases show this only: That as between the members of the firm, *inter sese*, Mr. Fletcher, in the first case, and the third person in the other case, were not copartners. They decided nothing as to the liability of either of them to the creditors of the existing firm.

But Mr. Collyer also cites 2 Bell Com. 636, where it is said; "There may be a sub-contract, by which a stranger may be admitted to divide with any of the partners his share of the profits. The other partners are not bound to take notice of this sub-contract; nor is there any responsibility attached to it, by which the stranger, as sharing in the profit of the concern, becomes liable for the debts of the partnership." Erskine's Institutes, and the case of *Fairholm vs. Majoribanks*, decided in Scotland in 1725, are cited in support of this position. In looking at 3 Ersk. Inst. (ed. of 1828,) §§ 21, 22, we find that nothing is there said concerning the liability of such stranger for the debts of the partnership. Mr. Erskine says, "if any of the partners shall assume a third person into partnership with him, such assumed person becomes partner, not to the

company, but to the assumer." We have not seen the report of *Fairholm vs. Majoribanks*. But Mr. Stark cites that case and Erskine's Institutes, in support of the following passage in his work on partnership: "Sub-contracts between partners and other persons, by which a beneficial interest in the partnership is granted, do not create new partners. The partner himself remains alone liable to company creditors." He adds a quotation from the Digest, which is silent, however, as to such other persons' liability for the debts of the partnership. Stark on Part. 155. It would seem, therefore, that the Scotch writers, Mr. Bell and Mr. Stark, have stated the doctrine which Mr. Collyer has repeated, only as an inference of their own from the established law, that such a sub-contract as those writers mention, between one member of a firm and a stranger, does not make the stranger, as between him and the firm, their copartner; and hence that the law of Scotland, as to such stranger's liability for the debts of the firm, may not differ from the law of England and of this country. Indeed, it is hardly to be supposed that it was decided in *Fairholm vs. Majoribanks*, that such a stranger was not liable for the debts of the firm in a case in which, by the English law and ours, he would have been liable. For both Mr. Bell and Mr. Stark, as well as Mr. Collyer, correctly state the English law on this point, without an intimation that the Scotch law is different, except by subsequently inserting the passage which the defendants' counsel cited at the trial of the present case. 2 Bell Com. 625, 626, Stark on Part. 137 & seq. Collyer on Part. book I. c. 1.

Now, what is our law and the law of England on this subject? We understand it to be thus: An agreement between one copartner and a third person, that he shall participate in the profits of the firm, as profits, renders him liable, as a partner, to the creditors of the firm, although, as between himself and the members of the firm, he is not their copartner; but if such third person, by his agreement with one member of the firm, is to receive compensation for his labor, services, &c., in proportion to the profits of the business of the firm, without having any specific lien on the profits, to the exclusion of other creditors, he is not liable for the debts of the firm. *Denny vs. Cabot*, 6 Met. 90-94. *Bradley vs. White*, 10

Met. 305. *Holmes vs. Old Colony Railroad*, 5 Gray, 58. *Burckle vs. Echart*, 3 Comst. 132. 3 Kent Com. (6th ed.) 33 *§ seq.* Parsons' Merc. Law, 168, and note.

In order to enable the jury to decide whether Samuel P. Harrington was liable for the debts of the firm of Whittemore, Harrington & Co. by reason of a sub-partnership between him and Leonard Harrington, they should have received instructions more definite and discriminating than they could derive from the mere words of Mr. Collyer. The kind of agreement which would render Samuel P. liable for the debts of the firm, and the kind of agreement which would not render him liable therefor, should have been so explained to them that they might intelligently decide whether the agreement between the two (if any was proved) was such as did or did not render Samuel P. liable as a partner, for the debts due from the firm to the plaintiffs.

The other instructions given to the jury seem to us to have been unexceptionable.

New trial granted.

In the Supreme Court of Wisconsin.—July 10, 1860.

SIMON MILLS, RESPONDENT, against EZRA H. GLEASON, TREASURER &c.,
APPELLANT.

1. The City of Madison, before the publication of its charter, issued certain bonds, and subsequently levied and collected a tax to pay the interest on such bonds, and paid it to the holders of the bonds; *held*, that this was such a ratification of the bonds as would bind the city, provided it would have been bound if the charter had been in force at the time the bonds were issued.
2. No special act and no express provision in a charter is required to enable a city to borrow money for purposes clearly municipal.
3. The kind and character of irregularities in tax assessments which invalidate them.

Abbott and Clark, for respondent.

S. U. Pinney, for appellant.

Appeal from Dane County Court.